IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

EDWARD O'FINNEGAN,

Plaintiff,

v. No. 10-CIV-965 WJ/LFG

CAPITAL ONE AUTO FINANCE,

Defendant.

DEFENDANT CAPITAL ONE AUTO FINANCE'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS
WITH ACCOMPANYING AUTHORITIES (DOC. 6)

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Capital One Auto Finance, Inc. ("Capital One") moved to dismiss (the "Motion", [Doc. 6]) Plaintiff's claims alleged pursuant to the Fair Credit Report Action ("FCRA"), 15 U.S.C. § 1681 (a) and (e),[1] because the violations of the FCRA alleged by Plaintiff do not provide for a private cause of action and Plaintiff has no standing to bring this action. Therefore, under any factual scenario, Plaintiff cannot state a claim for relief against Capital One pursuant to 15 U.S.C. § 1681s-2(a) or (e) and his claims should be dismissed.

Plaintiff's response to the Motion (the "Response" [Doc. 14]) appears to rely entirely on caselaw interpreting a different section of the FCRA than what his Complaint is based on.[2] Plaintiff does not allege a violation of any portion of the FCRA that allows for a private cause of

1 The claims for relief (stated as Counts I-LXV) relating to the FCRA are contained at ¶¶ 37-100 of the Complaint. [Doc. 1.] Capital One did not move to dismiss the remaining claims in the Complaint.

2 The Response also alleges numerous additional factual allegations not alleged in the Complaint. Even with these new factual allegations, Plaintiff fails to state a claim for relief. However, the new factual allegations are improper and cannot be considered. *See Wimberly v. City Of Clovis*, 375 F. Supp.2d 1120 (N.M. 2004); *Jocham v. Tuscola Cnty*, 239 F. Supp. 2d 714, 732 (E.D. Mich. 2003) ("The pleadings contain no such allegation, and the plaintiffs may not amend their complaint through a response brief.") (citing *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.")).

action in his Complaint and the facts alleged in his Complaint do not state a claim under any other provision of the FCRA.[3] Moreover, the Response entirely ignores the argument put forth by Capital One that § 1681s-2(e) does not apply to furnishers of information, and there is no private cause of action under that subsection. [Doc. 12, at 4-5.]

The Response also references Plaintiff's pro se status. However, just because a plaintiff is unrepresented by an attorney does not excuse a failure to state a claim. In reviewing a plaintiff's pro se complaint, courts apply the same legal standards applicable to pleadings drafted by counsel but liberally construes the allegations. *See Northington v. Jackson*, 973 F.2d 1518, 1520-21 (10th Cir. 1992). Even liberally construed, Plaintiff only alleges violations the FCRA that do not allow for a private cause of action against Capital One. Therefore, all of Plaintiff's claims relating to the FCRA should be dismissed because none of the allegations in the Complaint plausibly allege that Capital One engaged in any actionable misconduct. *See Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949-50 (2009)).

I. § 1681s-2(a) DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION.

The FCRA specifically states that subsection 2(a) does not provide a private cause of action. 15 U.S.C. § 1681s-2(c), (d).

> (c) Limitation on liability — Except as provided in section 1681s(c)(1)(B) of this title, **sections 1681n and 1681o of this title do not apply to any violation of —**
>
> **(1) subsection (a) of this section, including any regulations issued thereunder**;
>
> (2) subsection (e) of this section, except that nothing in this paragraph shall limit, expand, or otherwise affect liability under section 1681n or 1681o of this title, as applicable, for violations of subsection (b) of this section; or
>
> (3) subsection (e) of section 1681m of this title.
>
> (d) Limitation on enforcement — **The provisions of law described in paragraphs (1) through (3) of subsection (c)** (other than with respect to the exception described in paragraph (2) of subsection (c)) **shall be enforced**

[3] In his Complaint, Plaintiff recites verbatim § 1681s-2(a) three times, but never cites or refers to any portion of the FCRA that allows for a private cause of action. [Doc. 1, ¶¶ 42-48, 56-66, 74-79.]

> **exclusively as provided under section 1681s of this title by the Federal agencies and officials and the State officials** identified in section 1681s of this title.

15 U.S.C. § 1681s-2(c), (d) (emphasis added). Accordingly, courts have repeatedly held that there is no private cause of action under subsection (a). [*See* Doc. 12, at 4 (cases cited therein).] *See also Pinson v. Equifax Credit Info. Servs., Inc.*, 316 Fed. Appx. 744, 750-51, 2009 WL 595991, *4 (10th Cir. Mar. 10, 2009) (affirming Capital One's motion to dismiss a pro se plaintiffs' complaint that only alleged the plaintiffs notified Capital One that they disputed the accuracy of the information, and thus the complaint failed to state a claim); *Riviera v. American Gen. Fin. Servs., Inc.*, Civ. No. 06-00960 (D. N.M. Sept. 27, 2007) ("Courts consistently have held that 'under the plain language of the statute, the duty of a furnisher of credit information to investigate a credit dispute is triggered only after the furnisher receives notice of the dispute from a consumer reporting agency, not just the consumer.'") (quoting *Aklagi v. Nationscredit Fin.*, 196 F. Supp. 2d 1186, 1193 (D. Kan. 2002)); *Economou v. Wells Fargo*, Civ. No. 03-0405 (D. N.M. Jan. 26, 2004) (stating there is no private right of action for violations of subsection (a)). Plaintiff only alleges that Capital One violated subsection (a).[4] Therefore, Plaintiff fails to state a claim for relief.

In his Response, Plaintiff does not argue that he stated a claim under a different section of the FCRA that allows for a private right of action. Instead, Plaintiff continues to argue that subsection (a) allows for a private cause of action. However, the cases cited in Plaintiff's Response[5] do not support Plaintiff's contention because neither apply to claims alleged under subsection (a). In fact, both cases directly contradict Plaintiff's position. In *Gordon*, the court discussed how it dismissed the plaintiff's claims under § 1681s-2(a) because that statue does not provide a private cause of action. 266 F. Supp. 2d at 1009. The court stated:

---

[4] Plaintiff copies the statutory language of § 1681s-2(a) in his first claim (Counts I-XVI), and alleges Capital One reported inaccurate information. [Doc. 1, ¶¶ 42-48.] Plaintiff's second claim for relief (Counts XVII-XXXII) again recites § 1681s-2(a), and alleges Capital One failed to notify CRAs of disputed information. [Doc. 1, ¶¶ 56-66.] Plaintiff's third claim for relief (Counts XXXIII-XLIV) recites § 1681s-2(a) a third time, and alleges that Capital One continued to report inaccurate information after he notified it of the dispute. [Doc. 1,¶¶ 74-80.]

[5] Likewise, the Response's discussion of an agency rule is unavailing because nowhere in that rule does it grant a plaintiff a private right of action under § 1681s-2(a).

> The FCRA, therefore, imparts the duty to provide accurate information with the furnishers of information § 1671s-2(a). **To prevent the glut of cases in the federal courts that would result if every consumer could sue anytime he or she disputed the accuracy of furnished information, Congress wisely limited enforcement of this section to government agencies**.

Id. at 1011 (emphasis added). In *Dornhecker*, the court stated that § 1681s-2(c) and (d) limit the liability and enforcement "explicitly with respect to Subsection (a)." 99 F. Supp. 2d at 925; *see also Aklagi*, 196 F. Supp. 2d at 1194 (stating that consumers are protected against the conduct referenced in subsection (a) because they can report it to the Federal Trade Commission, which can enforce the subsection).

The Complaint only alleges violations of 15 U.S.C. § 1681s-2(a), and there is no private cause of action under that statute, and therefore Plaintiff's FRCA claims must be dismissed.

II. PLAINTIFF CANNOT STATE A CLAIM UNDER § 1681S-2(E).

In addition to alleging a violation of subsection (a), Plaintiff also alleges that Capital One violate subsection (e) of the FCRA. As set forth in Capital One's Motion, the plain language of § 1681s-2(e) also makes clear that it only applies to Federal banking agencies and the National Credit Union and not to Capital One, who is, as Plaintiff concedes, a furnisher of information to consumer reporting agencies. [Motion, Doc. 12, at 4-5.] Further, there is no private cause of action under subsection (e). [*Id.*, at 4.] As set forth *supra*, § 1681s-2(c) specifically states that the damages statutes §§ 1681n and 1681o have the exclusive ability to enforce subsection (e). 15 U.S.C. § 1681s-2(d). Plaintiff does not address either of these points. Accordingly, all of Plaintiff's claims relating to the FCRA must be dismissed.

III. CONCLUSION.

For all the foregoing reasons, the Complaint's claims under the FCRA must be dismissed pursuant to Rule 12(b)(6).

Respectfully submitted,

QUARLES & BRADY LLP
Kevin D. Quigley (kquigley@quarles.com)
John Craiger (jcraiger@quarles.com)
One Renaissance Square
Two North Central Avenue
Phoenix, AZ 85004
(602) 229-5200
Fax (602) 229-5690

and

MODRALL SPERLING ROEHL
HARRIS & SISK, P.A.

Electronically Filed

By /s/ Stan N. Harris, Attorney at Law
Stan N. Harris (sharris@modrall.com)
P. O. Box 2168
Albuquerque, NM 87103
(505) 848-1800
Fax (505) 449-2006

ATTORNEYS FOR DEFENDANT CAPITAL ONE AUTO FINANCE, INC.

I HEREBY CERTIFY that on the 25th day of January, 2011, I filed the foregoing electronically through the CM/ECF system.

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Participant via first-class mail, postage prepaid addressed as follows:

Edward O'Finnegan
1014 Washington Street, SE
Albuquerque, NM 87108

MODRALL SPERLING ROEHL
HARRIS & SISK, P.A.

By____/s/ Stan N. Harris___________
Stan N. Harris
Attorneys for Defendant Capital
One Auto Finance, Inc.

K:\dox\client\82981\0007\W1407011.DOCX